

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Columbia Insurance Company,)	C.A. No. 4:96-3411-22
)	
Plaintiff,)	
)	
v.)	ORDER
)	
Salley Brewer; Ron Brewer; Kathryn Stirling and)	
Keira Stirling, by their litigation guardian, Sally)	
Brewer; Sam J. Hunter; Joseph Davis d/b/a J. Davis)	
Enterprise, Inc.; Dart Trucking Company, Inc.; and)	
Commerce and Industry Insurance Company,)	
)	
Defendants.)	
)	

This is a declaratory judgment action based on diversity of citizenship, 28 U.S.C. § 1332, arising out of an insurance coverage dispute over an accident occurring in the City of Sarnia, province of Ontario, Canada, on January 23, 1994.

The matter is before the court on three outstanding motions. The first is the motion of Defendants Dart Trucking Company, Inc. ("Dart") and its general trucking liability insurer, Commerce and Industry Insurance Company ("Commerce") to Abstain on the Grounds of International Comity,¹ filed December 19, 1996. On January 13, 1997, Plaintiff Columbia Insurance

¹Defendants' motion was styled as a Motion to Dismiss, pursuant to Rule 12(b)(1), Fed. R. Civ. P., for lack of subject matter jurisdiction. There is, however, no contention by any party that this court lacks subject matter jurisdiction over the subject of the action by virtue of diversity of citizenship and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.* Rather, Defendants ask this court to exercise its discretionary authority to decline to hear this action because of international respect and comity concerns. Accordingly, the court will consider Defendants' motion as one to abstain.

Company, the bobtail insurer² for the accident truck's owner/lessor Defendant Joseph Davis d/b/a J. Davis Enterprise, filed its Memorandum in Opposition to Defendants' motion. On January 13, 1997, Dart and Commerce filed their Reply Memorandum, to which they attached the Affidavit of Robert E. Barnes, Queens Counsel of the Courts of Ontario, Canada.

The second outstanding motion is Defendants Commerce and Dart's Motion for Extension of Time to File Reply and Memorandum in Support, filed February 25, 1997. This motion seeks leave to supplement the record with additional materials in support of their motion to dismiss. Defendants contend these additional materials pertain to related Canadian litigation and that the materials were not available at the time of the filing of their January 13, 1997, Reply Memorandum in support of the Motion to Dismiss. On March 6, 1997, Plaintiff filed its opposition to this second motion. On March 10, 1997, Commerce and Dart filed their Reply brief as to the second motion.

The third outstanding motion is Plaintiff's Motion to Compel, filed March 14, 1997. Defendants' response time to this motion has not yet expired.

The court has reviewed the entire record in this matter, including all the briefs and affidavits or other documents, as well as the pleadings and answers to court's interrogatories. The court has also studied the applicable law. The matter is ripe for resolution.³ For the reasons given below, the court finds that principles of international comity fully support the court's decision to abstain. Accordingly, Defendants' Motion to Abstain, styled as a Motion to Dismiss, is GRANTED. The

²"Bobtail" and "deadhead" insurance is a form of commercial trucking insurance that provides coverage for the periods of time when the tractor is not hauling a trailer or is hauling an empty trailer.

³Because the court finds that the parties' positions are adequately set forth in their briefs and that oral argument would not advance the resolution of this matter, the court declines to hold oral argument.

court further finds that the interests of justice and lack of prejudice to Plaintiff warrant a GRANT of Commerce and Dart's February 25, 1997, Motion for Extension of Time to File Reply. All exhibits and attachments to that motion will be included as part of the official record in this case. Finally, because of the court's decision above granting Commerce and Dart's Motion to Dismiss, Plaintiff's Motion to Compel is MOOT.

I. FACTUAL BACKGROUND

The following facts, which are undisputed, are drawn from the complete record before the court. On January 23, 1994, an accident occurred in Sarnia, Ontario, between Sally Brewer, the driver of an automobile, her passengers, two minor children Kathryn and Keira Stirling, and Samuel Hunter, a truck driver. Hunter was an employee of the truck's owner, Joseph Davis d/b/a/ J. Davis Enterprise, Inc. ("Davis"), which had a policy of bobtail insurance with Columbia. Davis had the truck and trailer on long-term lease to Dart Trucking Co., Inc., whose commercial insurer is Commerce.

At the time of the accident, the truck and trailer were hauling a 20,000 pound load of incinerator ash and debris from York, South Carolina, to the Laidlaw Environmental Services facility in Corunna, Ontario. The truck and trailer displayed the I.C.C. placards of Dart Trucking. The accident occurred on Highway # 40, at the Plank Road intersection in Sarnia.

Litigation commenced in Ontario, Canada. In a personal injury action initiated in December 1995 in the General Division of the Ontario Court, Plaintiffs Sally Brewer, her husband and her children claimed that Davis's employee, Sam Joseph Hunter, was negligent and caused the accident. The plaintiffs there alleged that Mrs. Brewer sustained serious permanent physical and psychological injuries, including having glass embedded in her left temporal brain region, and having to undergo

extensive reconstructive surgery. They alleged that Mrs. Brewer has multiple permanent disabilities. The defendants in the Ontario action include the driver, Hunter, his employer, Davis, and the truck/trailer's long-term lessee, Dart Trucking Company. Although not presently named as parties to the Ontario action, the two insurers, Columbia and Commerce, are defending the action on behalf of their respective insureds, Davis and Dart. In that action Dart and Davis have filed cross-claims for indemnification based on their conflicting interpretations of the lease agreement between Dart and Davis. Moreover, in the Canadian litigation Hunter and Davis filed a Statement of Defence and Crossclaim on June 26, 1996, which asserted that Dart had an obligation "to provide public liability and property damage insurance for the protection of the public, as required by all federal and state laws and regulations." In response to Hunter and Davis' pleading, Dart filed its Statement of Defence to the Crossclaim of Hunter and Davis on January 31, 1997, in which it asserted that the plaintiff in the present action, Columbia Insurance Company, provided primary insurance coverage to Hunter and Davis.

The instant federal court action, filed November 12, 1996, in the Florence Division of the District of South Carolina, was brought by Columbia, a Nebraska corporation, against the Brewer family,⁴ the truck driver (Hunter), the truck's owner (Davis), the truck's lessee (Dart), and the lessee's insurer (Commerce). Columbia contends that its contract of insurance, made in South Carolina with Davis, provides only bobtail coverage. Because at the time of the accident the truck was hauling a load, Columbia contends it is entitled to a declaration that it has no obligation to defend Davis. In addition, Plaintiff also relies on an exclusion in its policy, the Contingent Liability Endorsement,

⁴No answer has been filed on behalf of the Brewer family. The court's records fail to disclose whether service has been effected on the Brewer family.

which denies coverage anytime the named insured is acting as agent or employee of another. Plaintiff contends that its named insured was acting on behalf of Dart and, therefore, under its policy it has no duty to provide coverage. In the alternative, Plaintiff contends that even if its policy does afford coverage, this court should declare that its policy provides only secondary coverage to that provided by Commerce. Defendants Hunter and Davis answered on December 6, 1996, contending that if Dart Trucking's insurer does not cover the collision, then its own policy with Columbia should. On December 19, 1996, Defendants Dart and Commerce filed their answer in which they essentially challenged the validity of Columbia's Contingent Liability Endorsement exclusion under Ontario law. They asserted that Ontario automobile insurance law is completely statutory and that any exclusions that conflict with it are of no force and effect. They contend that under the Province of Ontario Highway Traffic Act, Revised Statutes of Ontario 1990, Ch. I (8), only the owner of a vehicle has vicarious liability for the alleged negligence of a driver. Therefore, they contend Davis, the owner, is liable and that policy's exclusion, to the extent that it conflicts with Ontario law, is invalid.

II. MOTION TO ABSTAIN ON GROUNDS OF INTERNATIONAL COMITY

Defendants urge that this court should exercise its discretion and dismiss the complaint on the grounds of international abstention and comity. Defendants point out that under Ontario law every driver using its roads must have an Ontario policy of insurance or a policy with an insurer who has filed a Power of Attorney and Undertaking. Defendants argue that Columbia has never filed a Power of Attorney and Undertaking with the appropriate authorities, but now seeks to apply its contractual exclusion in a way that avoids coverage under the policy and is contrary to Ontario public policy. Defendants therefore urge that as a matter of respect for Ontario law and policy, this court

should abstain.

Defendants attach the affidavit of Mr. Barnes, Q.C., a practitioner in the field of Ontario motor vehicle insurance for approximately 30 years. The affidavit states:

The Highway Traffic Act of the Province of Ontario provides that the owner of a motor vehicle is liable for the negligent operation of that motor vehicle by the driver of the motor vehicle who is driving with the owner's consent. In the case of a leased vehicle apart from an employer-employee relationship, the lessee of a motor vehicle is not liable for the negligent operation of that motor vehicle, although the consent to operate by a lessee is tantamount to consent to operate by a lessor. For that reason the Ontario statutory policy of motor vehicle liability insurance insures only the owner and driver driving with the owner's or lessee's consent. Irrespective of any agreement or relationship between the owner and the lessee and again apart from an employer-employee relationship, *a lessee is not responsible for the negligence of the driver of the vehicle which the lessee leases*. Lease agreements routinely provide for the lessee placing insurance at the lessee's expense covering the owner and driver. My review of the documentation provided to me by my clients in this case [Dart] indicate that the defendant Sam J. Hunter was at all relevant times solely the employee of the tractor owner namely J. Davis Enterprise, Inc. and that J. Davis Enterprise, Inc. agreed between itself and Dart Trucking Company Inc. that Sam J. Hunter was the employee only of J. Davis Enterprise, Inc. and not of Dart Trucking Company Inc.

In my opinion, this exclusion relied upon by Columbia Insurance Company is unenforceable under Ontario, Canada law.

. . . The Ontario mandated policy in force at the time of the accident in question in this action contained no such exclusion . . . and accordingly, in my opinion, the driver of the tractor in question, was required in effect to be covered by the terms of the statutory Ontario policy.

As legal authority for the doctrine of international abstention, Defendants rely on *Turner Entertainment Co. v. Degeto Film GmbH*, 25 F.3d 1512 (11th Cir. 1994), in which the court of appeals concluded that considerations of fairness, efficiency, and international comity militated in favor of abstention pending the conclusion of all parallel German proceedings.

On the other hand, Plaintiff contends this matter is inappropriate for abstention. Plaintiff

argues that its contract with Davis, which includes the exclusion, arose in South Carolina and is governed by South Carolina law. It argues that abstention is a rarely invoked doctrine, *Moses H. Cone Mem. Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 16 (1983). It argues that *American Tank Transport, Inc. v. First People's Community Fed'l Credit Union*, 86 F.3d 1148 n.3 (4th Cir. 1996), dictates that there be parallel litigation to invoke abstention. It contends that because neither Columbia nor Commerce are named parties in Ontario, the Canadian litigation is not "parallel." Moreover, it contends that the issues in the Canadian action are primarily tort issues whereas the issues in the present case are contractual. In the alternative, Plaintiff argues that even if the actions are parallel, the requisite factors supporting abstention are lacking.

Under certain exceptional circumstances, a federal district court may order a stay or dismissal of an action to avoid duplicative litigation in a foreign country. *Ingersoll Mill Mach. Co. v. Granger*, 833 F.2d 680, 684 (7th Cir. 1987). Under the abstention analysis set forth in *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976), the analysis begins with an inquiry into whether the concurrent foreign and federal actions are essentially parallel. "A suit is parallel when substantially the same parties are contemporaneously litigating substantially the same issues in another forum." *Beres v. Village of Huntley, Ill.*, 824 F. Supp. 763, 767 (N.D.Ill. 1992).

In some private international disputes, the prudent and just action for a federal court is to abstain from the exercise of jurisdiction. *Turner Entertainment Co. v. Degeto Film GmbH*, 25 F.3d 1512 (11th Cir. 1994). The relative strengths and weaknesses of the American and foreign interests are relevant factors to consider in the context of international abstention. *Id.* Courts have weighed the policies favoring international respect or comity for foreign laws and judgments, fairness to the litigants, and the efficient utilization of judicial resources in resolving such motions. *Id.* With

respect to the fairness prong, courts consider the order in which the suits were filed, the more convenient forum, and the possibility of prejudice to the parties. *Id.* Criteria relevant to the efficient use of judicial resources include the inconvenience of the federal forum, the desire to avoid piecemeal litigation, the commonality of the parties and issues, and whether the alternative forum will render a prompt disposition. *Id.* With the above principles in mind, the court turns to application of these principles to the facts of this case.

Parallel Actions. The threshold issue is whether the instant proceeding can be deemed to be, in some part, “parallel” to the Canadian litigation. The court concludes that it is. The cross-claims for indemnification in the Canadian litigation between Dart and Davis will require that court to construe the leasing agreement’s provisions concerning the “employee” status of the truck driver, Hunter. Hunter’s status as an employee is at the heart of the dispute over application of the Contingent Liability Endorsement (disregarding the question whether the exclusion is void as against Ontario’s public policy). Moreover, the June 26, 1996 Statement of Defence filed by Hunter and Davis, and the January 31, 1997, Statement of Defence filed by Dart have brought all the issues pending in this case before the Canadian court. Thus, resolution of both the present insurance coverage dispute and the Canadian indemnity cross-claims turns on the same facts and is, therefore, “parallel.” Although it is true that the Canadian proceeding also encompasses the tort actions, this case is neatly subsumed into the questions being litigated in the Canadian forum. Moreover, to the extent that both insurers are now defending the Canadian action on behalf of their insureds, it appears that all parties to the present dispute are already appearing in the Canadian litigation.

International Comity Concerns. The Supreme Court has defined “comity” as follows:

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one

hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). In weighing the relative strengths of the Canadian and American interests here, the court finds that Canada's interests are stronger. Like many states in the United States, Canada has an undeniably strong public interest in the safe operation of motor vehicles in its provinces and in an effective motor vehicle insurance program that can fairly compensate victims of highway accidents. That strong interest is particularly manifest where, as here, the Ontario lawmakers have enacted statutory legislation establishing that all vehicles being operated on Ontario roads must carry the prescribed insurance, and that all insurers must file a Power of Attorney form with the authorities, a procedure ignored by Plaintiff here. In contrast to the strong Canadian interests, South Carolina's interests are rather limited, presenting only a question of contractual interpretation in which few persons beyond the immediate parties have an interest. In addition, where, as here, the Ontario lawmakers have enacted legislation calling into question the operation of exclusions such as Plaintiff's Contingent Liability Endorsement, this court concludes that principles of international comity and respect for the Ontario law dictate that the validity of the Endorsement be resolved by an Ontario court. In short, the Canadian court's finding on that issue will "trump" any decision this court render on contractual interpretation.

Fairness to the Parties. The Canadian action has predated the current litigation by some substantial period. In fact, the record indicates the Canadian action was filed on or about December 29, 1995, whereas this case was filed November 12, 1996. Thus, the advantage of the initial forum militates in favor of the Canadian forum. As to the more convenient forum, the record reflects that

the parties are spread among many states and two countries. Although some parties and witnesses hail from South Carolina, because those parties and witnesses will also need to appear in the Canadian forum anyway, this factor does not make South Carolina a more convenient forum, on balance. Finally, as to the possibility of prejudice, there is nothing that has occurred in the Canadian proceeding to indicate that abstaining will foreclose Plaintiff's chance to have a full and fair hearing. Thus, the fairness factors also point to a Canadian resolution.

Efficient Utilization of Judicial Resources. The Canadian court is already faced with the same factual scenario and cross-claims underpinning this declaratory judgment action. Efficient utilization of judicial resources favors resolving all matters pertaining to the accident in one forum, and avoiding piecemeal, possibly inconsistent results. Because of the commonality of parties and issues, and the fact that the Canadian proceeding is presumably further advanced than this case, it appears that the Canadian forum will render a decision on these issues prior to any resolution by this court. Accordingly, the concerns of judicial efficiency clearly favor the Canadian forum.

III. CONCLUSION

IT IS THEREFORE ORDERED that Defendants Commerce and Dart's Motion for Extension of Time to File Reply is GRANTED.

IT IS FURTHER ORDERED that Defendants' Commerce and Dart's Motion to Dismiss, filed December 19, 1996, which is construed as a motion to abstain, is GRANTED. The Clerk shall note on the docket that the court exercised its discretion to abstain on the grounds of international comity and that this action is DISMISSED against all Defendants.

IT IS FURTHER ORDERED that the court conditions the grant of Defendant Commerce and Dart's motion on their agreement not to oppose in the Canadian litigation any amendment of

pleadings necessary to bring Commerce into that action as a named party. Moreover, IT IS FURTHER ORDERED that Defendant Commerce accept service of process on it of any amended pleadings to be served in the Canadian litigation.

The Clerk of Court shall note that Plaintiff's March 14, 1997, Motion to Compel is MOOT.

IT IS SO ORDERED.

CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

Florence, South Carolina
March __, 1997